

1 HONORABLE RONALD B. LEIGHTON

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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT TACOMA

9 BARBARA LENSCH,

10 Plaintiff,

11 v.

12 ARMADA CORPORATION,

13 Defendant.

Case No. 3:10-CV-05167-RBL

14 ORDER GRANTING PLAINTIFF'S
15 MOTION FOR PARTIAL SUMMARY
16 JUDGMENT
17 [Dkt. #32].

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19
20 **I. INTRODUCTION**

21 THIS MATTER comes before the Court upon Plaintiff Barbara Lensch's Motion for
22 Partial Summary Judgment. [Dkt. #32]. The Court has considered the entirety of the record
23 herein, and for the reasons set forth below, the Court GRANTS the motion.

24
25 **II. BACKGROUND**

26 Plaintiff Barbara Lensch brings this action against Defendant Armada Corporation,
27 alleging several violations under the federal Fair Debt Collection Practices Act (FDCPA) and
28 under the Washington Collection Agency Act. She moves for partial summary judgment on three
of her eleven claims, each of which alleges that Defendant violated the FDCPA.

On January 6, 2005, Ms. Lensch allegedly bounced a \$25.00 check to a nail salon, Nails
R Us. [Def.'s Resp., Dkt. #49, at 1]. Three years later, Defendant Armada, a debt collector who
purchased the debt from the original creditor, mailed to Ms. Lensch a Notice of Dishonor
(NOD), which Ms. Lensch claims she never received. [Pl.'s Motion, Dkt. #32, at 2]. The letter

1 included the following language:

2
3 You are also CAUTIONED that law enforcement agencies may be provided with
4 a copy of this notice of dishonor and the check drawn by you for the possibility of
5 proceeding with criminal charges if you do not pay the amount of this check
6 within thirty-three (33) days after the date this letter is postmarked.

7 *Id.* at 3. RCW 62A.3-540 explicitly states that collection agencies may use this cautionary
8 language in a NOD. When Ms. Lensch did not respond to the notice, Armada began calling Ms.
9 Lensch at her home and work, leaving voicemail messages, which did not disclose that the
10 messages were from a debt collector. [Def.'s Resp., Dkt. #49, at 3]. Armada had a clear policy
11 that required its collectors to make this disclosure in only their initial communication with a
12 debtor. [Robbins Decl. Ex. B, Dkt. #33-2, at 56–57]. Eventually, Armada filed a summons and
13 complaint in Mason County District Court, attempting to collect on the \$25.00 dishonored check,
14 plus interest, fees, and statutory damages. [Def.'s Resp., Dkt. #49, at 2]. Nearly five years after
15 the check had been written, Ms. Lensch was served on December 16, 2009. *Id.*

16 After receiving the summons and complaint, Ms. Lensch requested validation of the debt,
17 and Armada sent her a copy of the NOD. *Id.* at 3. After exchanging several more emails and
18 phone calls, the parties still could not manage to resolve their dispute over a \$25.00 debt. A court
19 date was set, but on April 7, 2010, Armada moved to strike the hearing. [Robbins Decl. Ex. B,
20 Dkt. #33-2, at 111–12]. The record does not indicate whether Ms. Lensch ever paid off the debt.

21 On March 11, 2010, Plaintiff filed the present action, seeking (1) declaratory judgment
22 that Armada's conduct violated the FDCPA, (2) actual and statutory damages, and (3) costs and
23 reasonable attorney's fees. [Pl.'s Complaint, Dkt. #1]. She moves for partial summary judgment
24 on three claims under section 1692e of the FDCPA, which prohibits debt collectors from using
25 false or misleading representations in connection with collection of a debt.

26 **III. DISCUSSION**

27 **A. Standard of Review**

28 Summary judgment is appropriate when the record shows that there is no genuine issue of
fact and that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c);

1 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The moving party has the initial
2 burden of showing that no genuine issue of material fact exists. *Celotex Corp. v. Catrett*, 477
3 U.S. 317, 323 (1986); *U.S. v. Carter*, 906 F.2d 1375, 1376 (9th Cir. 1990). When a properly
4 supported motion for summary judgment is made, the burden then shifts, and the opposing party
5 must set forth specific facts showing that there is a genuine issue for trial. *Anderson*, 477 U.S. at
6 250. Put another way, summary judgment should be granted when the nonmoving party fails to
7 offer evidence from which a reasonable jury could return a verdict in its favor. *Id.* at 252. When
8 viewing the evidence at this stage, all justifiable inferences are drawn in favor of the nonmoving
9 party. *Id.* at 255.

10
11 **B. The Fair Debt Collection Practices Act (FDCPA) Prohibits False, Deceptive, and**
12 **Misleading Representations by Debt Collectors and Holds Them Strictly Liable for**
13 **Any Violations Under the Act.**

14 The purpose of the FDCPA is the elimination of abusive debt collection practices by debt
15 collectors and the promotion of consistent state action to protect consumers against debt
16 collection abuses. 15 U.S.C. § 1692. Accordingly, the statute prohibits debt collectors from using
17 any “false, deceptive, or misleading representation or means in connection with the collection of
18 any debt.” 15 U.S.C. § 1692e. Without limiting the general application of this rule, the statute
19 also enumerates sixteen specific examples of conduct that would be considered use of false or
20 misleading representation and therefore would violate the statute as a matter of law. *Id.*

21 For instance, the “representation or implication that nonpayment of any debt will result in
22 the arrest or imprisonment of any person. . . unless such action is lawful and the debt collector or
23 creditor intends to take such action” violates the FDCPA. 15 U.S.C. § 1692e(4). Additionally,
24 the Act prohibits the “false representation or implication that the consumer committed any
25 crime...in order to disgrace the consumer.” 15 U.S.C. § 1692e(7). The Act also requires that the
26 debt collector disclose in its initial communication with the debtor, whether written or oral, that
27 it is attempting to collect a debt and that any information obtained will be used for that purpose.
28 15 U.S.C. § 1692e(11). And finally, the failure to disclose in all subsequent communications that
the communication is from a debt collector violates the FDCPA. *Id.*

1 The test for determining whether a debt collector violated the FDCPA is objective and
2 does not depend on whether the debt collector intended to deceive or mislead the consumer.
3 *Clark v. Capital Credit & Collection Servs., Inc.*, 460 F.3d 1162, 1171 (9th Cir. 2006). Instead,
4 the “least sophisticated” debtor standard applies, and the liability analysis turns on whether a
5 debt collector’s communication would mislead an unsophisticated but reasonable consumer. *Id.*
6 Debt collectors are held strictly liable for any violations under the FDCPA. *Donohue v. Quick*
7 *Collect, Inc.*, 592 F.3d 1027, 1030 (9th Cir. 2010).

8
9 **C. Plaintiff Seeks Summary Judgment on her Claims Under 15 U.S.C. § 1692e(4), (7),
and (11)**

10 1. Defendant’s Notice of Dishonor Violated 15 U.S.C. § 1692e(4) as a Matter of Law

11 Ms. Lensch contends that Armada violated section 1692e(4) of the FDCPA when it
12 threatened in its NOD to pursue criminal proceedings if the debt was not paid. [Pl.’s Motion,
13 Dkt. #32, at 18]. In response to this claim, Armada attempts to shield itself from liability behind
14 a Washington state statute. [Def.’s Resp., Dkt. #49, at 7].

15 Section 1692e(4) explicitly states that the “representation or implication that nonpayment
16 of any debt will result in the arrest or imprisonment of any person...unless such action is lawful
17 and the debt collector or creditor intends to take such action” violates the FDCPA. The language
18 used in Armada’s NOD informs the debtor that if her claim is not paid within thirty-three days,
19 then law enforcement may be provided with a copy of the NOD and dishonored check for the
20 purpose of proceeding with criminal charges. [Robbins Decl. Ex. F, Dkt. #33-6]. This notice is a
21 clear violation of the FDCPA because (1) instituting criminal proceedings would not have been a
22 lawful action as the statute of limitations had already run,¹ and (2) the evidence demonstrates that
23 Armada had no intention of ever turning the check over to law enforcement. [Robbins Decl. Ex.
24 B, Dkt. #33-2, at 79–80].

25 Additionally, Armada has not presented any evidence in its response that shows it
26

27 ¹ RCW 9A.56.060(5) states that an unlawful issuance of a check in the amount of \$750.00 or less is a gross
28 misdemeanor. RCW 9A.04.080(i) states that “no gross misdemeanor may be prosecuted more than two years after
its commission.” In the present case, Ms. Lensch’s check was written on January 6, 2005—more than three years
prior to Defendant sending the first NOD in February 2008.

1 intended to refer the NOD to law enforcement. Instead, it goes to great lengths to distinguish the
2 facts of two cases, one of which was never cited in Plaintiff's motion,² and the other was simply
3 used to support the proposition that whether the debt collector intended to institute criminal
4 proceedings was dispositive of the issue.³ [Pl.'s Reply, Dkt. #51, at 2]. In fact, the evidence
5 provided by the parties on summary judgment shows as a matter of law that Armada has never
6 turned a check over to the police and did not ever intend to do so. [Robbins Decl. Ex. B, Dkt.
7 #33-2, at 79–80]. The FDCPA was enacted, in part, to prevent debt collectors from making
8 empty threats as a way to coerce payment from consumers. Based on these facts, a reasonable
9 jury could not find that Armada did not violate 15 U.S.C. § 1692e(4).

10 Defendant seeks to avoid this clear result by arguing that Washington state law makes
11 legal what the FDCPA expressly makes illegal. Armada asserts that RCW 62A.3-540 authorizes
12 its use of the cautionary language in the NOD and therefore protects Defendant from any liability
13 under the FDCPA.⁴ [Def.'s Resp., Dkt. #49, at 7–8]. This argument fails because the state statute
14 is preempted by the FDCPA.

15 Under the Supremacy Clause of the U.S. Constitution, state laws that interfere with or
16 contradict federal law are invalid. U.S. CONST. art. VI, cl. 2; *see also U.S. v. Arizona*, 2011 WL
17 1346945, *2 (9th Cir. 2011) (citing *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–
18 73 (2000)). Congress is not required to explicitly state that a federal statute preempts state law;

20 ² *Miller v. Midpoint Resolution Group, LLC*, 608 F. Supp. 2d 389 (W.D. N.Y. 2009) (holding that Defendant
21 violated the FDCPA when it verbally threatened the debtor with criminal prosecution over the phone). In the present
22 case, Armada argues in its response that because there were “no verbal threats or threats of any kind[.]” Plaintiff’s
23 motion should be denied. [Def.’s Resp., Dkt. #49, at 14–15].

24 ³ *Gradisher v. Check Enforcement Unit, Inc.*, 210 F. Supp. 2d 907, 916 (W.D. Mich. 2002) (discussing *Davis v.*
25 *Commercial Check Control, Inc.*, 1999 WL 89556 (N.D. Ill. Feb. 16, 1999), which held that because Defendant had
26 “no particularized intention to refer individual files for prosecution,” threatening to do so violated the FDCPA). The
27 court in *Gradisher* then went on to apply this principle to the facts of its case. *Id.* at 917.

28 ⁴ Defendant asserts in its response that both RCW 62A.3-540 and RCW 62A.3-520 authorize the language in the
NOD but limits its discussion to the former. The cautionary language in each statute is substantially similar;
however, RCW 62A.3-520 provides a fifteen-day window for payment of the debt rather than thirty-three days.
Additionally, RCW 62A.3-540 applies only when a check is assigned or written to a collection agency, and the
collection agency provides the NOD. But the statute also states that the cautionary language described in RCW
62A.3-520(1) may be used as “an alternative to providing a notice in the form described in RCW 62A.3-520.”
Because the FDCPA regulates only collection agencies’ practices, the discussion in this order will be limited to
RCW 62A.3-540.

1 rather, conflict preemption can occur when a state law stands as an obstacle to the fulfillment of
2 the intent and objectives of Congress. *Id.* When enacting the FDCPA, Congress found that
3 existing laws and procedures for redressing injuries caused by abusive debt collection practices
4 were “inadequate to protect consumers.” 15 U.S.C. § 1692(b). Thus, Congress intended for the
5 FDCPA to provide greater protection than state law,⁵ and the purpose of section 1692 was to
6 eliminate abusive practices and to promote consistent state action.⁶ 15 U.S.C. § 1692(e).

7 In this case, RCW 62A.3-540 interferes with the plain language of 15 U.S.C. § 1692e(4)
8 as well as Congress’s express purpose for enacting the FDCPA. Under Washington law, even if
9 the debt collector does not regularly turn over dishonored checks to law enforcement, a debt
10 collector may still caution the debtor about the possibility of criminal proceedings. For example,
11 Washington law provides the following qualification:

12 [The cautionary language] shall not be construed as a threat to take any action not
13 intended to be taken; nor shall it be construed to be harassing, oppressive, or
14 abusive; nor shall it be construed to be false, deceptive, or misleading
15 representation; nor shall it be construed to be unfair or unconscionable; nor shall
16 it be construed to violate any law.

17 RCW 62A.3-540(2). By mirroring the language of the FDCPA,⁷ the state statute purports
18 to circumvent the consumer protections provided under federal law. The “representation or
19 implication that nonpayment of any debt will result in the arrest or imprisonment of any
20 person...unless such action is lawful and the debt collector or creditor intends to take such

21 ⁵ If a state statute grants greater protection to a consumer than the FDCPA, then the statute would not be preempted.
22 *See* 15 U.S.C. § 1692n (“For purposes of this section, a State law is not inconsistent with this subchapter if the
23 protection such law affords any consumer is greater than the protection provided by this subchapter.”). In the present
24 case, RCW 62A.3-540 provides less protection by allowing debt collectors to threaten action that they neither intend
25 to take nor lawfully may take. Such a threat is one of the violations specifically enumerated by Congress in the
26 FDCPA. 15 U.S.C. § 1692e(4).

27 ⁶ For example, in *McCullough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 951 (9th Cir. 2011),
28 Defendant asserted that because its requests for admission complied with the applicable state rules, it was not liable
under the FDCPA. However, the court rejected this argument, stating “Congress enacted the FDCPA expressly
because prior laws for redressing ‘abusive, deceptive, and unfair debt collection practices’ were ‘inadequate to
protect consumers.’” *Id.* (quoting 15 U.S.C. § 1692(a), (b)). In order to apply the statute as Congress had written it,
the court held that “the statute preempts state laws ‘to the extent that those laws are inconsistent with any provision
of [the FDCPA].’” *Id.* at 951–52 (quoting 15 U.S.C. § 1692n).

⁷ *See, e.g.*, 15 U.S.C. § 1692e (“A debt collector may not use any false, deceptive, or misleading representation or
means in connection with the collection of any debt.”).

1 action” violates the FDCPA. 15 U.S.C. § 1692e(4). Under RCW 62A.3-540(2), however, even if
2 the debt collector does not regularly intend to take action and even if the debt collector may not
3 lawfully take action against the debtor, threatening to turn a dishonored check over to law
4 enforcement shall not be construed as a false or misleading representation. As a matter of law,
5 this statute wholly contradicts the FDCPA, which states the exact opposite: if a debt collector
6 does not intend to take action or may not take action because it would be unlawful, then it may
7 not threaten a consumer with criminal proceedings. *See* 15 U.S.C. § 1692e(4).

8 Because RCW 62A.3-540 is inconsistent with provisions of the FDCPA and impedes the
9 fulfillment of congressional intent, it must give way to federal law. RCW 62A.3-540 is
10 preempted and therefore is not a valid affirmative defense to Plaintiff’s FDCPA claims.

11
12 2. Defendant’s Notice of Dishonor Violated 15 U.S.C. § 1692e(7) as a Matter of Law

13 Ms. Lensch also argues that Armada violated section 1692e(7) of the FDCPA when it
14 threatened to pursue criminal proceedings in its NOD if the debt was not paid in thirty-three
15 days. [Pl.’s Motion, Dkt. #32, at 18–19]. Section 1692e(7) prohibits the “false representation or
16 implication that the consumer committed any crime or other conduct in order to disgrace the
17 consumer.” Defendant does not adequately respond to this claim but instead argues that RCW
18 62A.3-540 authorizes the language and protects it from liability under the FDCPA. [Def.’s Resp.,
19 Dkt. #49, at 7–8]. Accordingly, Armada does not raise any genuine issues of material fact with
20 respect to this claim that would justify taking it to trial.

21 By threatening to turn the NOD over to law enforcement, Armada insinuated that Ms.
22 Lensch had committed a crime three years earlier when she bounced the \$25.00 check to Nails R
23 Us. While this Court is frustrated that the parties could not manage to resolve this minor dispute
24 without the intervention of the federal courts, the language used in the NOD is a clear violation
25 of the FDCPA because it falsely represented that Ms. Lensch could be prosecuted for her act. In
26 fact, under Washington’s bad check law, a person cannot be prosecuted for bouncing a check
27 unless she had the specific intent to defraud the recipient. RCW 9A.56.060. An unsophisticated
28 consumer could not be expected to distinguish a statement by a debt collector that means what it

1 says—criminal proceedings may be instituted if the debt is not paid—from the specific elements
2 actually necessary for prosecution under state law. The purpose of the FDCPA, in part, is to
3 prevent debt collectors from falsely stating that a consumer committed a crime in order to induce
4 her to pay the debt owed.

5 Yet, Armada asserts that RCW 62A.3-540 authorizes the cautionary language at issue in
6 the NOD, but as stated in the discussion above, the FDCPA preempts this statute because it
7 lessens consumer protection and obstructs the fulfillment of the FDCPA. Plaintiff has met her
8 burden under this claim, and Defendant has not presented any evidence in its response from
9 which a reasonable jury could conclude that it did not violate 15 U.S.C. § 1692e(7). Because
10 parties are held strictly liable under the FDCPA, Plaintiff’s motion on this claim must be granted.

11
12 3. The Voicemail Messages Left for Plaintiff by Defendant Violated 15 U.S.C.
13 § 1692e(11) as a Matter of Law

14 Finally, Ms. Lensch contends that Armada violated 15 U.S.C. § 1692e(11), which
15 requires a debt collector to disclose in subsequent communications with the debtor that it is a
16 debt collector and any information received during the communication will be used for that
17 purpose. [Pl.’s Motion, Dkt. #32 at 13]. Armada admits that its policy and procedures require
18 collectors to disclose who they are only in the initial communication. [Robbins Decl. Ex. B, Dkt.
19 # 33-2, at 57–58]. It further admits that the disclosure would never be made during a subsequent
20 communication. *Id.* at 59, 63. In regards to Plaintiff’s account, Defendant’s representative
21 testified during her deposition that no debt collector at Armada disclosed in its communications
22 with Ms. Lensch that it was a debt collector. *Id.* at 56–57. Because Defendant has failed to
23 present any evidence that would allow a reasonable jury to conclude that it did not violate 15
24 U.S.C. § 1692e(11), Plaintiff’s motion for summary judgment on this claim must be granted.

25 First, Armada argues that the motion should be denied because Plaintiff failed to allege
26 any facts regarding voicemail messages or phone calls in her first amended complaint. [Def.’s
27 Resp., Dkt. #49, at 15]. Armada, however, had notice of Plaintiff’s claim alleging a violation of
28 section 1692e(11). *See id.*; *see also* Pl.’s First Am. Complaint, Dkt. #11, at 13. Furthermore,
Plaintiff tailored her discovery requests for the purpose of examining Armada’s communications

1 with Plaintiff, which necessarily includes not only emails and letters sent to the debtor but also
2 phone calls and voicemail messages. [See Robbins Decl. Ex. H, Dkt. #33-8 at 4–5]. At no time
3 did Armada object to these requests as beyond the scope of discovery. At no time did it object on
4 the grounds that the requests were not reasonably calculated to produce admissible evidence.
5 And at no time during its representative’s deposition did it object to questions about voicemail
6 communications. The key issue under FRCP 8 is whether Armada had fair notice of the section
7 1692e(11) claim and an opportunity to defend against it. In this case, both of these requirements
8 were met. Accordingly, this claim must turn on its merits rather than a flawed procedural
9 argument.

10 Next, Armada argues that if a voicemail message contains no information about a debt,
11 then it cannot be considered a “communication” under the FDCPA, and therefore, disclosure that
12 the call is from a debt collector is not required. [See Def.’s Resp., Dkt. #49, at 20]. Because
13 Plaintiff failed to provide a recording or transcript of the voicemails, Armada argues that there
14 remains a question of fact for the jury to determine whether the voicemail was a
15 communication.⁸ *Id.* at 21–22. In support of its assertion that a communication must contain
16 information regarding a debt in order to trigger the disclosure requirement, Defendant cites two
17 unpublished district court cases, which represent the minority viewpoint on this issue. *Id.* at 20
18 (citing *Koby v. ARS Nat’l Servs.*, 2010 WL 1438763 (S.D. Cal. 2010); *Biggs v. Credit*
19 *Collections, Inc.*, 2007 WL 4034997 (W.D. Okla. 2007)).

20 For example, the Seventh Circuit has plainly rejected the narrow interpretation of a
21 communication in *Koby*, consistently holding that because the presumptive purpose of every
22 phone call from a debt collector to a debtor is an attempt to collect the money owed, any
23 message left constitutes a communication under the FDCPA. *See, e.g., Horkey v. JVDB &*
24 *Associates, Inc.*, 333 F.3d 769, 774 (7th Cir. 2003). In addition, several cases in our circuit have
25 held that even if the messages do not mention the debt explicitly, section 1692a(2) applies to
26 indirect communications; thus, disclosure that the call is from a debt collector is required
27 whether or not the nature of the call is revealed. *See, e.g., Costa v. Nat’l Action Fin. Servs.*, 634

28 ⁸ The definition of a communication under the FDCPA is “the conveying of information regarding a debt directly or indirectly to any person through any medium.” 15 U.S.C. § 1692a(2).

1 F. Supp. 2d 1069, 1076 (E.D. Cal. 2007); *Hosseinzadeh v. M.R.S. Associates., Inc.*, 387 F. Supp.
2 2d 1104, 1116 (C.D. Cal. 2005). The weight of authority falls in favor of a broad interpretation,
3 and most courts to decide this issue have held that voicemails are communications that must
4 conform to the disclosure requirements of section 1692e(11).

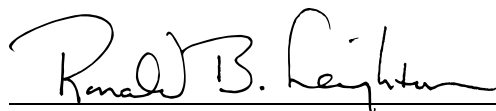
5 This broad definition of communication is also consistent with the purpose of the
6 FDCPA, which must be liberally construed in favor of the consumer. Affirming the narrow
7 interpretation advocated by Defendant would provide a loophole for debt collectors and allow
8 them to tailor their voicemail messages in order to circumvent the disclosure requirement under
9 section 1692e(11). *See Ramirez v. Apex Fin. Mgmt., LLC*, 567 F. Supp. 2d 1035, 1041 (N.D. Ill
10 2008). This Court will not undermine congressional intent in such a way. Armada has admitted
11 that its company policy does not require debt collectors to disclose who they are during
12 subsequent communications with a debtor. Its representative testified that none of the voicemails
13 left for Ms. Lensch would have included this disclosure. Based on this evidence, a transcript or
14 recording of the calls is not necessary to decide the issue. As a matter of law, Defendant violated
15 section 1692e(11) of the FDCPA, and Plaintiff's motion must be granted.

16 IV. CONCLUSION

17 Plaintiff has met her burden, demonstrating that no genuine issue of material facts exist
18 with respect to her claims under sections 1692e(4), 1692e(7), and 1692e(11) of the FDCPA. A
19 reasonable jury could not find that the violations did not occur, and Plaintiff is entitled to
20 judgment as a matter of law. Furthermore, Armada's reliance on a Washington state statute does
21 not excuse violations under federal law. Therefore, Plaintiff Lensch's Motion for Partial
22 Summary Judgment on these three claims is GRANTED, and Defendant's liability on these
23 claims is established. The amount of damages shall be determined at trial.

24 **IT IS SO ORDERED.**

25 Dated this 13th day of June, 2011.

26 

27 RONALD B. LEIGHTON
28 UNITED STATES DISTRICT JUDGE